BANK OF CHINA v. SYNN LEE & CO. LTD.

[O.C.J. (Hepworth J.) January 9, 1962]

[Penang — Civil Suit No. 225 of 1959]

Banking Law — Cheques — Claim as holder in due course — Agreement to draw against cheques before clearance — Whether agreement existed — Status of holder if no agreement — Rights of holder in due course.

Practice and Procedure — Adjustment of claims — Involving persons not party to action — Whether separate proceedings necessary.

A banker who is asked by a customer to collect a crossed cheque and who, pursuant to a contract express or implied, credits the customer forthwith with the amount of the cheque before that amount has been received becomes a holder in due course. The payment that he subsequently receives on the cheque is for himself and not for the customer.

This position is not altered whether the amount of the cheque is drawn against or not by the customer subsequent to its crediting or the amount is utilised by the banker in reduction of an overdraft. The question must be whether there exists an agreement to give immediate credit before clearance. Such an agreement may be express or implied.

In this case it was found as a fact that there existed an agreement between the plaintiff bank and a firm of Heng Moh & Co. whereby Heng Moh & Co. were permitted credit against crossed cheques deposited by them with the plaintiff bank before the cheques were cleared. Defendant was drawer of two cheques amounting to $31,840 payable to Heng Moh & Co. and plaintiff bank had given credit in respect of the cheques to Heng Moh & Co. Plaintiff now claimed $36,587.59 being principal $31,840 with interest at 5% per annum thereon.

Held: the sum owed by Heng Moh & Co. to the plaintiff bank when the former ceased to do business was $36,587.59. On March 31, 1958 Heng Moh & Co. had paid in $10,000 to the credit of the plaintiff thus reducing the debt to $26,587.59. The plaintiff's claim on the two cheques therefore exceeded the amount due to them by $5,252.41 and it would be inequitable for him to recover from the defendant a sum in excess of the sum to which he was entitled. To leave the adjustment to separate proceedings between the parties would be putting the defendant and Heng Moh & Co. to wholly unnecessary expense.

Cases referred to:—

(1) *Capital and Counties Bank Ltd.* v. *Gordon* [1903] A.C. 240.

(2) *Clarke* v. *London and County Banking Co.* [1897] 1 Q.B. 552.

(3) *Underwood (A.L.) Ltd.* v. *Barclays Bank* [1924] 1 K.B. 775.

SUIT.

Eusoffe Abdoolcader for the plaintiff.

Ng Ek Teong for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff's claim is against the defendant as drawer of two cheques drawn on the Taiping Branch of the Overseas-Chinese Banking Corporation Ltd. payable to a firm named Heng Moh & Co. or bearer for the sums of $17,000 and $14,840 respectively and dated respectively the 21st and 22nd November, 1957, and crossed "A/C Payee only."

The plaintiff claims as a holder in due course of the said two cheques having given value in good faith to Heng Moh & Co. The plaintiff alleges that there was a standing arrangement between the plaintiff and the said Heng Moh & Co. whereby the latter were permitted to draw against cheques paid in to the credit of their account prior to clearance. As a result the plaintiff had given value to the said Heng Moh & Co. in respect of the said two cheques and was accordingly a holder in due course.

The defence contends that there was no such arrangement between the plaintiff and Heng Moh & Co. as the plaintiff alleged, denies that the plaintiff upon delivery of the two cheques became a holder in due course in respect of them and contends that the plaintiff was only an agent for collection of the said two cheques.

A banker who is asked by a customer to collect a crossed cheque and who, pursuant to a contract express or implied so to do, credits the customer forthwith with the amount of the cheque before that amount has been received, in fact receives the sum for himself and not for the customer. This is so because, by crediting the customer with the money before receiving it, the bank has become a holder for value (*Capital and Counties Bank Ltd.* v. *Gordon*).(1) The banker becomes a transferee if he gives cash for it over the counter, or if the cheque is paid in on the footing that it may be drawn at once; and this seems to be the position whether it is in fact drawn against or not, or is paid in in oxpress reduction of an overdraft. But the mere existence of an overdraft, though the banker's lien in respect thereof constitutes him for certain purposes a holder for value to the extent of that lien, would not appear to preclude the protection of section 82 of the Bills of Exchange Ordinance, 1949 (*Clarke* v. *London and County Banking Company*).(2)

The mere fact that the banker has credited the cheque in his customer's account before receiving the proceeds does not deprive him of protection against the true owner in the event of the customer having no title, or a defective title, to the cheque (section 82(2) of the Ordinance). Crediting the customer's account does not of itself alter the position of the banker from that of agent for collection to that of holder for value. It is a question of fact in each case. In order to constitute the banker a holder for value there must be a contract, express or implied, that the customer should be entitled to draw against the amount of the cheque before it is cleared (*Underwood (A.L.) Ltd.* v. *Barclays Bank*).(3)

If the banker becomes a holder for value he can, in the absence of a forged endorsement, sue upon a crossed cheque in his own name and, unless the cheque is crossed "not negotiable", as a holder in due course, and may debit the customer if the cheque is dishonoured (*Halsbury's* Laws of England, 3rd edition, Volume 2, page 185).

It is agreed by both parties that the sole issue in this case is whether there was such an arrangement as alleged by the plaintiff or not. If there was such an arrangement then the plaintiff was a holder in due course and is entitled to succeed. If there was no such arrangement then the plaintiff was only an agent for collection

and his claim must be dismissed. The question that has to be decided is a question of fact.

The plaintiff called three witnesses, one of whom was formerly the Manager of the Penang Branch of the plaintiff Bank (P.W.1), another of whom was formerly the Assistant Chief of the Business Department of the plaintiff Bank (P.W.2) and the third of whom was formerly the Accountant of the Penang Branch of the plaintiff Bank (P.W.3). All these witnesses gave evidence to the effect that there had been an arrangement entered into between the plaintiff Bank and Heng Moh & Co. some time in 1956 to the effect that Heng Moh & Co. would be entitled to draw against cheques presented by them for payment to the plaintiff Bank before those cheques were cleared. Although these witnesses might have been more definite in the manner in which they gave their evidence I can see no real reason why their story should be doubted. They were all responsible persons at present holding responsible positions in other Banks. They were no longer employed by the plaintiff Bank as the plaintiff Bank no longer carries on the business of banking. There was, therefore, apart from any other considerations, nothing to be gained by these witnesses in telling a story which was not true.

The difficulty, and I think the only difficulty, that has arisen in this case, is that the account of Heng Moh & Co. with the plaintiff Bank for the year 1957 is indicative more of an agreement that Heng Moh & Co. should be permitted to overdraw their account than that there was such an arrangement as is alleged by the plaintiff. It is this that the defendant firm have based their arguments upon. They say that the 1957 account disproves the evidence given by the plaintiff's witnesses as it clearly indicates that the cheques paid by Heng Moh & Co. into their account were used to reduce an existing overdraft, and that subsequent drawings by Heng Moh & Co. could not be said to be made against such cheques prior to their clearance because such cheques had already been used for the reduction of the pre-existing overdraft. These accounts therefore showed an agreement to give overdraft facilities and nothing more.

A perusal of the 1957 account shows that cheques paid in by Heng Moh & Co. were credited to their account immediately and prior to clearance. This is shown quite clearly by a number of cheques which were dishonoured and in respect of which the resulting debit in Heng Moh & Co.'s account occurred three or four days after that upon which the dishonoured cheque had been credited. This is also the case in regard to the two cheques which are the subject matter of this action, debits on dishonour being entered some days after those upon which they were credited.

But even though the 1957 accounts are more indicative of general overdraft facilities this does not in itself negative the existence of an agreement to give credit in respect of paid-in cheques before they are cleared. It seems to me that the only difference that an overdraft makes where there has been such an agreement is that the credit is given, not in respect of cheques subsequently presented for payment, but in respect of the reduction of the debit existing at the time of payment in. In other words the important point is that it is an agreement to give credit before clearance and whether credit is given by permitting drawing before clearance or by permitting reduction of the overdraft before clearance does not affect the matter Once there has been an agreement to give credit and credit has been given the Banker is a Transferee for value. It matters not in my view where there has been an agreement for a customer to draw against cheques paid in before they are cleared that the account subsequently becomes overdrawn and credit is thereafter given not by drawing against the credit but by reducing the amount of the overdraft before clearance.

That credit was given in the case of the two cheques with which we are concerned is borne out by the fact that a sum in respect of interest covering the period between the date of payment in and the date of dishonour was, after dishonour, debited to Heng Moh & Co.'s account in respect of them.

In the circumstances, therefore, I am of the opinion that the account of Heng Moh & Co. with the plaintiff Bank cannot be said to negative the evidence given by the three witnesses to whom I have referred, and I am satisfied that there was an arrangement between Heng Moh & Co. and the plaintiff Bank as alleged by the plaintiff Bank. The plaintiff Bank is, therefore, a holder in due course in respect of these cheques and is entitled to succeed.

There is one complication however. When Heng Moh & Co. finally ceased to do business they were indebted to the plaintiff Bank in the sum of $36,587.59. That was on the 1st January, 1958. On the 31st March, 1958, Heng Moh & Co. paid in to the credit of their account with the plaintiff Bank the sum of $10,000 reducing the debit balance to $26,587.59. The plaintiff Bank are claiming principal sums totalling $31,840, together with interest thereon at the rate of 5% per annum from the 21st November, 1957. It will be seen, therefore, that the plaintiff's claim exceeds the principal amount due to them by $5,252.41.

It is contended on behalf of the plaintiff that the plaintiff is entitled to judgment as prayed, and any rights over that the defendant may have against Heng Moh & Co. and correspondingly Heng Moh & Co. against the plaintiff are matters which should be the subject of separate proceedings. I am unable to agree with this contention. In the first place it would be most

inequitable for the plaintiff to recover from the defendant a sum in excess of that to which the plaintiff is entitled. Secondly, to put the defendant in the position of having to recover the balance, if I may so put it, from the plaintiff via Heng Moh & Co. by way of separate proceedings would be putting the defendant, and for that matter Heng Moh & Co., to wholly unnecessary expense. Accordingly in my view the principal sum which the plaintiff is entitled to recover is the total of the two cheques, $31,840, less the sum of $5,252.41, that is to say, $26,587.59.

There will accordingly be judgment for the plaintiff for the principal sum of $26,587.59, interest at 5% per annum from the 22nd November, 1957, to the 31st March, 1958, on the sum of $31,840, interest at 5% per annum from the 1st April, 1958, to the 29th September, 1959, on the sum of $26,587.59 and interest on the sum of $26,587.59 at the rate of 5% per annum from the 30th September, 1959 to date, and the defendant will pay the plaintiff's costs.

Judgment for the plaintiff.

Solicitors: *Presgrave & Matthews; Braddell & Ramani.*

SYED AHMAD v. CHAN HON THIM

[O.C.J. (Neal J.) April 21, 1961]

[Ipoh — Civil Appeal No. 3 of 1961]

Landlord and Tenant — Reassessment of rent — Control of Rent Ordinance, 1956, s.16 — Refusal of Board to reassess — Application heard without service of notice on all sub-tenants — Whether valid hearing — Whether Rent Assessment Board may refuse to reassess.

Where an application is made under section 16 of the Control of Rent Ordinance, 1956, to the Rent Assessment Board to fix rental paid by sub-tenants to a tenant, the Board must proceed to assess the rental to be paid by sub-tenants in accordance with the provisions of the Ordinance.

On such an application all sub-tenants must be served in accordance with the mandatory provisions of the statute. As the statute is not clear on whom falls the responsibility of serving the notices on the sub-tenants, the ultimate responsibility rests on the Rent Assessment Board.

CIVIL APPEAL.

B. K. Das for the appellant.

Respondent in person.

Neal J. (delivering oral judgment): This is an appeal by a sub-tenant against the refusal of the Rent Assessment Board, Ipoh, to make an order on an application by the appellant under section 16 of the Control of Rent Ordinance, 1956, to fix the rental paid by the appellant, who is a sub-tenant of the premises, to the respondent who is a head-tenant. I stopped Mr. Das in the course of his argument because, in my opinion, this Court is bound to order a retrial before the Rent Assessment Board on two grounds: firstly, the other sub-tenants had not been served (this is clear from the record of the proceedings) in accordance with the mandatory provisions of the statute. Secondly, the statute itself, in my opinion, clearly provides that once an application is made under section 16 the Rent Assessment Board will proceed to assess as between all of the sub-tenants the rental to be paid by each, that rental being a proportion of and not exceeding the rental paid by the head-tenant plus 10 per cent. In arriving at the proportion to be paid allowance will have to be made as in this case in respect of furniture, if any, supplied pursuant to the contract, and any other services supplied pursuant to the contract. The words, "pursuant to the contract," require emphasis in view of the contention apparently put forward before the Rent Assessment Board that an allowance must be made in respect of other electricity provided. The contract between the parties is, to my mind, clear. It is a hiring of part of the premises plus certain furniture not enumerated at the stipulated rent. Under the contract there was nothing to have stopped the respondent from recovering. if he is able to prove the quantum, a proportion of the electricity bill from the present appellant, but it is not included in the contract rental.

To assist the Board in re-hearing this application let me repeat: that it is not a question of whether or not the agreement entered into between the parties is a reasonable one or not; it is a question once an application is made by a sub-tenant of assessing (after notice) as between all of the sub-tenants after making allowance for any part occupied by the respondent, the total rental paid to the landlord plus 10 per cent. To these figures in each case can properly be added an assessment in respect of any furniture supplied as in this case by the head-tenant in accordance with the terms of the contract between the parties. There will be a retrial of the present application.

As regards the question of costs, in my opinion, this is an appropriate matter where the costs should be reserved until I am aware of the ultimate result of these proceedings.

I wish in conclusion to add only one thing: the statute is not clear on whom it falls the responsibility of serving the notices on the sub-tenants and, in that connection, I can only say that since it is a condition precedent to the right of the Rent Assessment Board to make any order in default of the steps having been taken, the ultimate responsibility will rest on the Rent Assessment Board.

The deposit in Court is to be paid out to the appellant.

Retrial ordered.

Solicitors: *Das & Co.*